Supreme Court, U. S.
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IN THE

Supreme Court of the United States

DOCKET NO. 76-464

GERALD SHREIBER and STANLEY WEISS,
Petitioners,

vs.

UNITED INDUSTRIAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK—APPELLATE DIVISION

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

Respondent filed a Brief in Opposition to Petition for Writ of Certiorari asserting that the "Petition should be dismissed because it is untimely; . . . because it raises or attempts to raise a constitutional question never raised or preserved before . . . [and because] all the requirements of due process under the provisions of the Fourteenth Amendment of the Constitution of the United States were fully satisfied in the instant case" (Brief in Opposition, P. 7).

Petitioners assert that each and every reason advanced by Respondent in opposition to the Petition for Writ of Certiorari is without basis in fact.

I. Respondent alleges that the Petition for Writ of Certiorari (hereinafter referred to as "The Petition") should be dismissed on the ground that it was "not timely filed within the purview of 28 U.S.C. 2101(c) . . ." (Brief in Opposition, P. 2).

In the instant case, the Supreme Court of New York, Appellate Division affirmed the trial court's denial of the motion to vacate the default judgment on February 2, 1976 (Petition, Exhibit J, P. 19a).

Motion for leave to appeal to the Court of Appeals of New York was denied by that Court on July 8, 1976 (Petition, Exhibit F, P. 10a).

28 U.S.C. 2101(c) provides "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit, or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

On October 1, 1976 the Petition before the Court was docketed, a time less than ninety (90) days from the date that the Court of Appeals of New York dismissed the notice for leave to appeal. This is certainly within the time period specified in 28 U.S.C. 2101(c).

Furthermore, 28 U.S.C. 1257(c), under which jurisdiction exists in the instant case; says, in pertinent part;

State Courts; Appeal; Certiorari

Final judgments or decrees rendered by the *Highest Court for a State in which a decision could be had,* may be viewed by the Supreme Court as follows:

> "(3) by a writ of certiorari . . . where the validity of a State statute is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States." [Emphasis supplied]

Under the above statute, the Petition could not have been filed prior to the July 8, 1976 decision by the Court of Appeals of New York dismissing the motion for leave to appeal, and therefore Petitioners had ninety (90) days from July 8, 1976 to file the Petition. This was done on October 1, 1976.

II. Respondent alleges that the Petition should be dismissed because it raises or attempts to raise, a constitutional question never raised or preserved before and thus the Court of Appeals of New York was therefore deprived of the first opportunity to consider the constitutionality of Section 3215 of the New York Civil Practice Laws and Rules.

It should be clear that the decision and opinion of the New York Supreme Court, Appellate Division, rendered by that Court on February 2, 1976 (Petition, Exhibit G, 11a-3a) gave rise to the challenge in the Petition of Section 3215 of the New York Civil Practice Laws and Rules. The Court of Appeals dismissed the motion filed by Petitioners' New York counsel for leave to appeal, thus the constitutional attack on the above New York rule could not be raised in the highest state court.

Furthermore, the issue raised by Petitioners of lack of due process was raised implicitly throughout the lower courts in New York.

Therefore, it should be clear that when there is a serious violation of due process, as in the instant case, the allegation of a violation of due process in the motion to vacate the default judgment filed in New York and in the Appeal to the Supreme Court of New York, Appellate Division certainly preserves the issue for consideration in this Court.

III. Respondent alleges that the Petition should be denied because all the requirements of due process under the provision of the Fourteenth Amendment of the United States Constitution were fully satisfied in the instant case. Nothing could be further from the truth. The violation of Petitioners' due process rights was so blatant that it is submitted that it is shocking to the conscience of this Court.

Respondent argues that Petitioners could have had notice of the hearing for the assessment of damages if they filed a demand as specified in Section 3215 F(2) of the New York Civil Practice Laws and Rules. Respondent claims that failure to do so was a waiver of an opportunity to be heard. (Brief in Opposition, P. 4)

It should be clear that a fraud was committed on Petitioners in Respondent's failure to give Petitioners notice of the assessment of damages hearing based on a claim inherently one of unliquidated damages and particularly when no one, including Petitioners or those purporting to act as their counsel, was given notice of the entry of a default judgment. To construe Section 3215 F(2) of the Civil Practice Laws and Rules as providing that a failure to demand a notice of a hearing based on a judgment taken without notice to the Petitioners constitutes a waiver of that right is to misconstrue that statute. Clearly, if one has no notice that a default judgment has been entered against him, he cannot demand notice of a subsequent assessment of damages hearing.

Furthermore, Respondent took the default judgment based on a claim of unliquidated damages and, knowing that neither Petitioners nor their counsel knew of the default judgment or when it was taken, proceeded to the hearing to "prove" its damages. To construe the failure of Petitioners to demand notice of the assessment of damages hearing under these circumstances as a waiver of their rights to do so is to render the due process clause of the Fourteenth Amendment and the requirement of notice and an opportunity to be heard inoperative whenever one party can pervert the judicial process to secure a sneak judgment.

Respondent's reliance on *Owens v. I.F.P. Corporation*, 374 F. Supp. 1032 (W.D. Kentucky 1974), *aff'd* 419 U.S. 807, 95 Sct. 23, 42 L.Ed.2d 36 (1974) is misplaced since that case did *not* hold that notice is not required for a hearing on assessment of damages following a default as Respondent suggests. (Brief in Opposition, P. 6)

The Court in *Owens, supra*, dealt with whether a summons served on a defendant in Kentucky violated due process in not conveying enough information to a defendant to enable a defendant so served to take the necessary steps to avoid default. The Court held, inter alia, that the Kentucky summons did not violate due process and was not confusing when it conveyed the fact that the defendant should "appear and defend within twenty (20) days after service" or "judgment will be taken against you for the relief demanded in the complaint."

In the instant case Petitioners are not, for the purpose of this Petition, contesting the validity of the summons or the validity of the default. Petitioners contend that the failure to give notice of assessment of damages hearing based on the unliquidated claims set forth in the summons is a violation of due process. Accordingly, *Owens, supra,* is inapplicable.

Petitioners submit that the case of *Griffin v. Griffin*, 327 U.S. 220, 66 Sct. 556, 90 L.Ed. 635 (1946), *rehearing denied* 328 U.S. 876, 66 Sct. 975, 90 L.Ed. 1645 (1946), decided by this Court, stands for the proposition that failure to give notice of an assessment of damages hearing to a person over whom the Court has in personam jurisdiction constitutes a denial of due process.

The *Griffin* case has its origin in a divorce and alimony proceeding. Wife obtained a divorce from husband in 1924 by a divorce proceeding commenced under the jurisdiction of the Supreme Court of New York, a Court of original jurisdiction. The Husband appeared and submitted himself to the jurisdiction of the New York Court. Subsequently, in 1926, an award of alimony was granted in favor of Wife. By 1935, the alimony was not paid in accordance with a court order. Wife then moved to obtain judgment for alimony arrearages. Meanwhile, Husband had moved to the District of Columbia. Not-

withstanding, Husband appeared in the Supreme Court of New York proceeding and contested Wife's motion to reduce the alimony arrearages to judgment. The Court entered judgment against him for $18,493.64.

Next follows the significant aspect of this case dealing with the failure to give notice and violation of due process. In early 1938, Wife filed a motion with the Supreme Court of New York for a judgment on alimony arrearages to that date. Her motion comprised two parts: the first requested a judgment be entered in the amount of $18,493.64, which she had already received from the Court, with interest; and for an additional judgment from the time of the first judgment to the time of her motion, i.e., 1936 to 1938. The Husband was given no notice with respect to the assessment of damages hearing to be held in 1938 pursuant to the Wife's motion for alimony arrearages to be brought up to date, especially covering the period from 1936 to 1938.

It was conceded that the Husband received no notice with respect to the assessment of damages hearing in 1938.

The Supreme Court of New York in 1938 rendered a final judgment against Husband in favor of Wife in the amount of $25,382.75. This judgment comprised the earlier judgment of $18,493.64, with interest, and subsequent alimony arrearages allegedly due from 1936 to 1938, in the amount of $3,750, with additional interest of $550. It is the hearing on the assessment of alimony arrearages resulting in an additional award of $3,750, with interest of $550 on which Husband received no notice.

The violation of due process occurred when Husband was not given notice of the 1938 hearing at which time additional damages were assessed against him with resultant judgment.

Wife sought to enforce the New York judgment in the District Court for the District of Columbia. Husband contested the judgment on the grounds that the judgment of 1938 was entered without notice to him and for that reason was null and void for want of due process. The District Court and the Circuit Court of Appeals dismissed the objection and found the judgment valid and in favor of Wife.

This Court issued a Writ of Certiorari and reversed the lower courts, holding, that there was a want of judicial due process in the failure to give Husband notice of the 1938 hearing on assessment of damages. It stated that while the 1936 judgment was apparently valid because the Husbad had entered and defended, nevertheless, the 1938 judgment, a new proceeding, entitled Husband to notice of such proceeding. It was conceded that the 1938 judgment was entered without actual notice to or appearance for the Husband and without any form of service of process calculated to give him notice of the proceedings. The Court stated that there was a constitutional precept that a court may not act to give a personal judgment in absence of notice.

In the instant case, Petitioners had no notice of the assessment of damages hearing and thus they had no opportunity to defend against the extent of damages. Even though Petitioners were served with a summons indicating a judgment would be taken against them if they failed to appear within twenty (20) days, Petitioners had the right to be notified as to the hearing on the assessment of damages.

As the Supreme Court said in *Griffin, supra,* "while it is undoubtedly true that the 1926 decree . . . gave Petitioner notice at the time of its entry that further proceed-

ings might be taken to docket in judgment form the obligation to pay installments occurring under the decree, we find in this no ground for saying that due process does not require further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the 1926 decree did not." 327 U.S. 229, 66 Sct. 561, 90 L.Ed. 335.

The *Griffin* case is a clear decision by this Court that due process requires a form of notice reasonably calculated to reach a party where an assessment of damages hearing is to be held against him and for which he may be responsible, notwithstanding the Court of original jurisdiction over said party.

CONCLUSION

The Petition was timely filed within the requirement of U.S.C. 2101(c).

The question involving the constitutionality of Section 3215 of the New York Practice Laws and Rules could not be raised in the Court of Appeals of New York since said Court dismissed Petitioners' motion for leave to appeal. Furthermore, the motion to vacate default judgment filed with the Supreme Court of New York and the appeal to the New York Supreme Court, Appellate Court, Appellate Division implicitly raised the issue of the Constitutional deprivation claimed in that Petition and as such was preserved for review.

The requirement of notice and an opportunity to be heard was not satisfied in the instant case due to the blatant disregard for the due process right of the Petitioners by the manner in which the assessment of damages was held without notice to Petitioners and as such renders the judgment void.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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